U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-S-, INC.

DATE: JAN. 25, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development services, seeks to employ the Beneficiary as a "senior member technical staff." It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner had not established that it is a successor-in-interest to the labor certification employer because the Petitioner acquired the labor certification employer's business several years before the filing of the labor certification.

On appeal, the Petitioner cites to previously submitted evidence and asserts that it has established by a preponderance of the evidence that it is a successor-in-interest to the entity that filed the labor certification.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

A. Successor-in-Interest

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the "particular job opportunity" stated on it. 20 C.F.R. § 656.30(c)(2). The Director found that the Petitioner did not become a successor-in-interest to the employer that filed the labor certification (E-C-) at a date that allows it to use the labor certification and denied the petition.

A petitioner may, under certain circumstances, rely on a labor certification approved for another business entity if the petitioner is a successor in interest to the original labor certification employer. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). Establishing a successor-in-interest relationship under *Matter of Dial Auto* is a three-part test. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id.*

Here, the Petitioner filed a Form I-140, Immigrant Petition for Alien Worker, on February 16, 2017, on behalf of the Beneficiary and asserted that it is the successor–in-interest to E-C-, the employer that filed the labor certification on August 31, 2016. As evidence of its successorship, the Petitioner submitted:

1. An April 1, 2013, Contribution Agreement between: (1) E-C-; (2) V-, Inc.;[1] and (3) G-, Inc.;
2. An April 1, 2013, Employment Matters Agreement between: (1) E-C-; (2) V-, Inc.; and (3) G-, Inc.; and
3. A Third Amended and Restated Certificate of Incorporation showing that G-, Inc. changed its name to P-S-, Inc. (the Petitioner's current name) on May 17, 2016.

The above evidence indicates that E-C- and outside investors formed the Petitioner in 2013, with the E-C- transferring certain assets to the new corporation and controlling a majority of its stock. The record reflects that the Petitioner and E-C- continued to exist as separate entities after 2013. For example, on its 2016 labor certification, E-C- states that it commenced doing business in 1979, has 26,900 employees, and lists a Massachusetts address and a nine-digit federal employer identification number ending in [redacted] In contrast, on its 2017 petition, the Petitioner states that it commenced

[1] Although a party to the Contribution and Employment Matters agreements, V-, Inc. is not otherwise involved in this proceeding.

doing business in 2013, has 1600 employees, and lists a California address and a nine-digit federal employer identification number ending in [redacted]

The Director denied the petition, after concluding that the Petitioner and E-C- continued to exist as separate entities after April 2013. Consequently, the Director determined that the Petitioner did not become a successor-in-interest to E-C- at a date that allows it to use E-C-'s 2016 labor certification, and had filed the petition without the labor certification required by section 212(a)(5)(A)(i) of the Act.

On appeal, the Petitioner cites to the previously submitted evidence and asserts that it has submitted sufficient documents to establish that it is a successor-in-interest to E-C-. However, neither USCIS nor the DOL recognize a successorship formed before the start of the immigration process. USCIS has stated: "For successor-in-interest purposes, the transfer of ownership may occur at any time *after the filing or approval of the original labor certification* with [the] DOL." USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revision to the Adjudicator's Field Manual (AFM) Chapter 22.2* 23 (Dec. 22, 2010), https://www.uscis.gov/laws/policy-memoranda (emphasis added) (last visited Dec. 18, 2017). The DOL recognizes a successorship created before a labor certification's filing, but only if an employer was acquired or merged after it began advertising a position for labor certification purposes.[2] DOL Office of Foreign Labor Certification, *OFLC Frequently Asked Questions and Answers*, Advertisement Content, Question #10, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited Dec. 18, 2017). Neither agency has recognized a successorship created, as in this case, years before the start of the labor certification process.

Moreover, a petitioner must fully describe and document the transaction transferring ownership of all, or a relevant part of, the predecessor employer. If the relevant part of E-C- was transferred to the Petitioner in 2013, the Petitioner has not explained why the labor certification for the offered position was filed by E-C- in 2016. The Petitioner's claimed acquisition of the labor certification employer three years prior to the filing of the labor certification prevents the Petitioner from using the labor certification filed by E-C- in support of its immigrant petition.[3]

Consequently, the Petitioner may not use E-C-'s labor certification and therefore has filed a petition without the labor certification required by this classification under section 212(a)(5)(A)(i) of the Act. For this reason, the petition may not be approved.

[2] Under the current labor certification process, employers test the U.S. labor market by advertising an offered position before filing an application for labor certification. 20 C.F.R. § 656.17(e).

[3] In addition to the questionable timing of the acquisition, the continued existence of E-C- as a separate entity after the claimed acquisition raises additional questions about the alleged successorship.

B. Ability to Pay

Although the Director found that the Petitioner has the ability to pay the proffered wage, the record does not contain the regulatory required evidence to establish its ability to pay the proffered wage. A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2).[4] Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, USCIS examines whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not annually pay the full proffered wage, USCIS considers whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the proffered wage and the wages paid. If net income and net current assets are insufficient, USCIS may also consider other factors affecting a petitioner's ability to pay a proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[5]

Here, the accompanying labor certification with a priority date of August 31, 2016, states the proffered wage of $140,000 a year. The record includes some pay stubs for the Beneficiary showing his year to date wages as of November 4, 2016, but does not contain a form of regulatory required evidence. Moreover, where a petitioner has filed I-140 petitions for multiple beneficiaries, it must demonstrate that its job offer to each beneficiary is realistic, and that it has the ability to pay the proffered wage to each beneficiary. *See* 8 C.F.R. § 204.5(g)(2); *see also Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries). USCIS records show that the Petitioner filed multiple I-140 petitions for other beneficiaries. Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or filed after the priority date of the current petition. We only consider the other beneficiaries for any year that the Petitioner has not paid the Beneficiary a salary equal to or greater than the proffered wage.

In any future filing in this matter, the Petitioner must document the receipt numbers, names of beneficiaries, priority dates, and proffered wages of these other I-140 petitions, and indicate the status of each petition and the date of any status change (i.e., pending, approved, withdrawn, revoked, denied, on appeal or motion, or beneficiary obtained lawful permanent residence). To offset the total wage burden, the Petitioner may submit documentation showing that it paid wages to other beneficiaries. Absent such information, we cannot find that the Petitioner had the ability to pay in 2016. If the Petitioner pursues this matter, it must also submit a form of regulatory required evidence of its ability to pay from 2016

[4] This petition's priority date is the date the DOL received the accompanying labor certification for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[5] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rizvi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x 292 (5th Cir. 2015).

onward and evidence of its ability to pay this Beneficiary and the beneficiaries of its other I-140 petitions from 2016 to present.

We acknowledge that the Petitioner provided a letter from its controller in support of its ability to pay the proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (stating that a letter from a financial officer of a petitioner with at least 100 employees "may" establish its ability to pay). However, because the record indicates the Petitioner's filing of multiple petitions, we find the letter insufficient to establish the Petitioner's ability to pay in the absence of other documentation.

III. CONCLUSION

The Petitioner has not established by a preponderance of the evidence that it is a successor-in-interest to the labor certification employer. Consequently, the Petitioner has filed a petition without the required labor certification and the petition may not be approved. The Petitioner has also not established its ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of P-S-, Inc.* ID# 899618 (AAO Jan. 25, 2018)